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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION
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12 NOELLE REYNA,

13 Plaintiff,

14 v.

15 NANCY BERRYHILL, DEPUTY
16 COMMISSIONER OF OPERATIONS
17 FOR THE SOCIAL SECURITY
ADMINISTRATION,

18 Defendant.
19

No. CV 17-5428-PLA

MEMORANDUM OPINION AND ORDER

I.

PROCEEDINGS

21 Plaintiff filed this action on July 23, 2017, seeking review of the Commissioner's¹ denial of
22 her applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI")
23 payments. The parties filed Consents to proceed before a Magistrate Judge on October 5, 2017,
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25 ¹ On March 6, 2018, the Government Accountability Office stated that as of November 17,
26 2017, Nancy Berryhill's status as Acting Commissioner violated the Federal Vacancies Reform Act
27 (5 U.S.C. § 3346(a)(1)), which limits the time a position can be filled by an acting official. As of
28 that date, therefore, she was not authorized to continue serving using the title of Acting
Commissioner. As of November 17, 2017, Berryhill has been leading the agency from her position
of record, Deputy Commissioner of Operations.

1 and February 26, 2018. Pursuant to the Court's Order, the parties filed a Joint Stipulation
2 (alternatively "JS") on August 14, 2018, that addresses their positions concerning the disputed
3 issues in the case. The Court has taken the Joint Stipulation under submission without oral
4 argument.

5 6 II.

7 **BACKGROUND**

8 Plaintiff was born on August 26, 1966. [Administrative Record ("AR") at 20, 188, 190.] She
9 has past relevant work experience as a stock clerk, a florist, a retail assistant manager, a bead
10 worker, and a picture framer. [AR at 28, 66-67.]

11 On November 7, 2012, plaintiff filed an application for a period of disability and DIB, and
12 on November 28, 2012, she filed an application for SSI payments, alleging in both that she has
13 been unable to work since November 16, 2011. [AR at 20; see also AR at 188-89, 190-91.] After
14 her applications were denied initially and upon reconsideration, plaintiff timely filed a request for
15 a hearing before an Administrative Law Judge ("ALJ"). [AR at 152-53.] A hearing was held on
16 February 24, 2016, at which time plaintiff appeared represented by an attorney, and testified on
17 her own behalf. [AR at 36-73.] A vocational expert ("VE") also testified. [AR at 64-72.] On March
18 30, 2016, the ALJ issued a decision concluding that plaintiff was not under a disability from
19 November 16, 2011, the alleged onset date, through March 30, 2016, the date of the decision.
20 [AR at 20-30.] Plaintiff requested review of the ALJ's decision by the Appeals Council. [AR at
21 186-87.] When the Appeals Council denied plaintiff's request for review on May 25, 2017 [AR at
22 1-5], the ALJ's decision became the final decision of the Commissioner. See Sam v. Astrue, 550
23 F.3d 808, 810 (9th Cir. 2008) (per curiam) (citations omitted). This action followed.

24 25 III.

26 **STANDARD OF REVIEW**

27 Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner's
28 decision to deny benefits. The decision will be disturbed only if it is not supported by substantial

evidence or if it is based upon the application of improper legal standards. Berry v. Astrue, 622 F.3d 1228, 1231 (9th Cir. 2010) (citation omitted).

“Substantial evidence means more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Revels v. Berryhill, 874 F.3d 648, 654 (9th Cir. 2017) (citation omitted). “Where evidence is susceptible to more than one rational interpretation, the ALJ’s decision should be upheld.” Id. (internal quotation marks and citation omitted). However, the Court “must consider the entire record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner’s conclusion, and may not affirm simply by isolating a specific quantum of supporting evidence.” Id. (quoting Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014) (internal quotation marks omitted)). The Court will “review only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not rely.” Id. (internal quotation marks and citation omitted); see also SEC v. Chenery Corp., 318 U.S. 80, 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”).

IV.

THE EVALUATION OF DISABILITY

Persons are “disabled” for purposes of receiving Social Security benefits if they are unable to engage in any substantial gainful activity owing to a physical or mental impairment that is expected to result in death or which has lasted or is expected to last for a continuous period of at least twelve months. Garcia v. Comm’r of Soc. Sec., 768 F.3d 925, 930 (9th Cir. 2014) (quoting 42 U.S.C. § 423(d)(1)(A)).

A. THE FIVE-STEP EVALUATION PROCESS

The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006) (citing Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999)).

1 In the first step, the Commissioner must determine whether the claimant is currently engaged in
2 substantial gainful activity; if so, the claimant is not disabled and the claim is denied. Lounsbury,
3 468 F.3d at 1114. If the claimant is not currently engaged in substantial gainful activity, the
4 second step requires the Commissioner to determine whether the claimant has a “severe”
5 impairment or combination of impairments significantly limiting her ability to do basic work
6 activities; if not, a finding of nondisability is made and the claim is denied. Id. If the claimant has
7 a “severe” impairment or combination of impairments, the third step requires the Commissioner
8 to determine whether the impairment or combination of impairments meets or equals an
9 impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R. § 404, subpart P,
10 appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id. If the
11 claimant’s impairment or combination of impairments does not meet or equal an impairment in the
12 Listing, the fourth step requires the Commissioner to determine whether the claimant has sufficient
13 “residual functional capacity” to perform her past work; if so, the claimant is not disabled and the
14 claim is denied. Id. The claimant has the burden of proving that she is unable to perform past
15 relevant work. Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992). If the claimant meets
16 this burden, a prima facie case of disability is established. Id. The Commissioner then bears
17 the burden of establishing that the claimant is not disabled because there is other work existing
18 in “significant numbers” in the national or regional economy the claimant can do, either (1) by
19 the testimony of a VE, or (2) by reference to the Medical-Vocational Guidelines at 20 C.F.R. part
20 404, subpart P, appendix 2. Lounsbury, 468 F.3d at 1114. The determination of this issue
21 comprises the fifth and final step in the sequential analysis. 20 C.F.R. §§ 404.1520, 416.920;
22 Lester v. Chater, 81 F.3d 721, 828 n.5 (9th Cir. 1995); Drouin, 966 F.2d at 1257.

23 24 **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

25 At step one, the ALJ found that plaintiff had not engaged in substantial gainful activity since
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1 November 16, 2011, the alleged onset date.² [AR at 22.] At step two, the ALJ concluded that
2 plaintiff has the severe impairments of degenerative disc disease, cervical and lumbar spine;
3 adjustment disorder; and anxiety disorder. [Id.] He found plaintiff's right lateral epicondylitis was
4 non-severe, and that her alleged hearing loss and vertigo were not medically determinable
5 impairments. [AR at 24-25.] At step three, the ALJ determined that plaintiff does not have an
6 impairment or a combination of impairments that meets or medically equals any of the impairments
7 in the Listing. [AR at 25.] The ALJ further found that plaintiff retained the residual functional
8 capacity ("RFC")³ to perform light work as defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b),⁴
9 "except: low stress, only occasional decision making required and only occasional changes in the
10 work setting; occasional interaction with the public." [AR at 26.] At step four, based on plaintiff's
11 RFC and the testimony of the VE, the ALJ concluded that plaintiff is unable to perform any of her
12 past relevant work as a stock clerk, a florist, a retail assistant manager, a bead worker, and a
13 picture framer. [AR at 28, 67-69.] At step five, based on plaintiff's RFC, vocational factors, and
14 the VE's testimony, the ALJ found that there are jobs existing in significant numbers in the national
15 economy that plaintiff can perform, including work as an "assembler, small products" (Dictionary
16 of Occupational Titles ("DOT") No. 706.684-022), and as a "photocopy machine operator" (DOT
17 No. 207.685-014). [AR at 29, 69.] Accordingly, the ALJ determined that plaintiff was not disabled

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19 ² The ALJ concluded that plaintiff met the insured status requirements of the Social
20 Security Act through December 31, 2015. [AR at 22.]

21 ³ RFC is what a claimant can still do despite existing exertional and nonexertional
22 limitations. See Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). "Between steps
23 three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which
the ALJ assesses the claimant's residual functional capacity." Massachi v. Astrue, 486 F.3d 1149,
1151 n.2 (9th Cir. 2007) (citation omitted).

24 ⁴ "Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of
25 objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this
26 category when it requires a good deal of walking or standing, or when it involves sitting most of
27 the time with some pushing and pulling of arm or leg controls. To be considered capable of
28 performing a full or wide range of light work, you must have the ability to do substantially all of
these activities. If someone can do light work, we determine that he or she can also do sedentary
work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for
long periods of time." 20 C.F.R. §§ 404.1567(b), 416.967(b).

1 at any time from the alleged onset date of November 16, 2011, through March 30, 2016, the date
2 of the decision. [AR at 30.]

3
4 **V.**

5 **THE ALJ'S DECISION**

6 Plaintiff contends that the ALJ erred when he: (1) assessed plaintiff's subjective symptom
7 testimony; (2) assessed the medical evidence; and (3) failed to consider plaintiff's obesity in his
8 analysis. [JS at 3.] As set forth below, the Court agrees with plaintiff, in part, and remands for
9 further proceedings.

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11 **A. SUBJECTIVE SYMPTOM TESTIMONY**

12 Plaintiff contends that the ALJ's "adverse credibility assessment is not supported by clear
13 and convincing reasons." [JS at 4.]

14 The ALJ summarized plaintiff's testimony as follows:

15 [Plaintiff] testified that she stopped working in October 2011 at Ralph's supermarket.
16 She stated that she had physical problems including fibroids that made it hard for
17 her to bend, high blood pressure, hearing problems due to a loud speaker, and
18 cervical and lumbar spine issues that started after working on a flat, slippery
19 surface. She said she was able to continue lifting, but would have low back pain
20 after standing too long. She said that she has learned to "ease up." She said she
21 also has pains when she reaches out and grabs something. She said she has sharp
22 pain in her lower back about once a month. She said lifting her nieces too much,
23 who weigh 25 pounds and 50 pounds [sic]. She testified that she helps babysit her
24 nieces. She said that the girls don't let her sit ever. She said she is still working.
25 She said she can sit for a half [sic] before she needs to adjust herself and then is
26 done sitting after an hour. She said it feels like she has a pinched nerve in her
27 arms. She said the chiropractic treatment helps and if she gets the treatment
28 regularly, she is okay.

[Plaintiff] testified that she was told on her last day of work she was abnormally slow,
and she was then told that she had posttraumatic stress disorder. She said it
causes her to fall to the floor. She said her doctors haven't said much about it. She
said she takes Lexapro, which she said has helped. She said Adderall really helped
her focus. She said she stopped it on accident. She said she has trouble focusing
and if she is around people[] she doesn't know[,] she gets dry mouth and sweats.
She said she gets anxious around people and nervous. She said in the last two
weeks, she's had vertigo. She said she also has intense emotions and will cry in
front of people. She said it happens now once a month.

[AR at 26-27.]

1 The ALJ found that plaintiff's statements "concerning the intensity, persistence and limiting
2 effects of these symptoms are not entirely consistent with the evidence for the reasons explained
3 in this decision." [AR at 27.] With respect to plaintiff's statements of back and neck pain, the ALJ
4 stated that plaintiff "does not frequently use narcotic pain medications and has had little therapy
5 or treatment from physicians or orthopedic specialists for her back, which lessens the consistency
6 of her statements that she suffers from severe, intractable pain." [*Id.*] He also noted that plaintiff's
7 activities of daily living, which include "no trouble getting dressed, putting on socks or shoes, doing
8 housework, driving, or sleeping through the night," and "extensively babysit[ting] her nieces," are
9 not as limited as would be expected given her complaints of disabling symptoms and limitations.
10 [AR at 27, 28.] The ALJ further found that because there was "little in the way of objective findings
11 by her treating mental health providers," plaintiff's "testimony regarding her mental symptoms [was
12 rendered] less than fully consistent." [AR at 27-28.]

13 On March 28, 2016, two days prior to the ALJ's decision in this case, SSR 16-3p went into
14 effect. See SSR 16-3p, 2016 WL 1119029 (Mar. 16, 2016). SSR 16-3p supersedes SSR 96-7p,
15 the previous policy governing the evaluation of subjective symptoms. *Id.* at *1. SSR 16-3p
16 indicates that "we are eliminating the use of the term 'credibility' from our sub-regulatory policy,
17 as our regulations do not use this term." *Id.* Moreover, "[i]n doing so, we clarify that subjective
18 symptom evaluation is not an examination of an individual's character[;] [i]nstead, we will more
19 closely follow our regulatory language regarding symptom evaluation." *Id.*; Trevizo v. Berryhill,
20 871 F.3d 664, 678 n.5 (9th Cir. 2017). Thus, the adjudicator "will not assess an individual's overall
21 character or truthfulness in the manner typically used during an adversarial court litigation. The
22 focus of the evaluation of an individual's symptoms should not be to determine whether he or she
23 is a truthful person." SSR 16-3p, 2016 WL 1119029, at *10. The ALJ is instructed to "consider
24 all of the evidence in an individual's record," "to determine how symptoms limit ability to perform
25 work-related activities." *Id.* at *2. The Ninth Circuit also noted that SSR 16-3p "makes clear what
26 our precedent already required: that assessments of an individual's testimony by an ALJ are
27 designed to 'evaluate the intensity and persistence of symptoms after [the ALJ] find[s] that the
28 individual has a medically determinable impairment(s) that could reasonably be expected to

1 produce those symptoms,’ and ‘not to delve into wide-ranging scrutiny of the claimant’s character
2 and apparent truthfulness.” Trevizo, 871 F.3d at 678 n.5 (citing SSR 16-3p).

3 To determine the extent to which a claimant’s symptom testimony must be credited, the
4 Ninth Circuit has “established a two-step analysis.” Trevizo, 871 F.3d at 678 (citing Garrison, 759
5 F.3d at 1014-15). “First, the ALJ must determine whether the claimant has presented objective
6 medical evidence of an underlying impairment which could reasonably be expected to produce the
7 pain or other symptoms alleged.” Id. (quoting Garrison, 759 F.3d at 1014-15); Treichler v. Comm’r
8 of Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th Cir. 2014) (quoting Lingenfelter v. Astrue, 504 F.3d
9 1028, 1036 (9th Cir. 2007)) (internal quotation marks omitted). If the claimant meets the first test,
10 and the ALJ does not make a “finding of malingering based on affirmative evidence thereof”
11 (Robbins v. Soc. Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006)), the ALJ must “evaluate the
12 intensity and persistence of [the] individual’s symptoms . . . and determine the extent to which
13 [those] symptoms limit [her] . . . ability to perform work-related activities” SSR 16-3p, 2016
14 WL 1119029, at *4. An ALJ must provide specific, clear and convincing reasons for rejecting a
15 claimant’s testimony about the severity of her symptoms. Trevizo, 871 F.3d at 678 (citing
16 Garrison, 759 F.3d at 1014-15); Treichler, 775 F.3d at 1102.

17 Where, as here, plaintiff has presented evidence of an underlying impairment, and the ALJ
18 did not make a finding of malingering [see generally AR at 22-28], the ALJ’s reasons for rejecting
19 a claimant’s credibility⁵ must be specific, clear and convincing. Brown-Hunter v. Colvin, 806 F.3d
20 487, 488-89 (9th Cir. 2015); Burrell v. Colvin, 775 F.3d 1133, 1136 (9th Cir. 2014) (citing Molina
21 v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012)). “General findings [regarding a claimant’s
22 credibility] are insufficient; rather, the ALJ must identify what testimony is not credible and what
23 evidence undermines the claimant’s complaints.” Burrell, 775 F.3d at 1138 (quoting Lester, 81
24 F.3d at 834) (quotation marks omitted). The ALJ’s findings “‘must be sufficiently specific to allow
25 a reviewing court to conclude the adjudicator rejected the claimant’s testimony on permissible
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27 ⁵ While SSR 16-3p eliminated the use of the term “credibility,” case law using that term is still
28 instructive in the Court’s analysis.

grounds and did not arbitrarily discredit a claimant's testimony regarding pain.” Brown-Hunter, 806 F.3d at 493 (quoting Bunnell v. Sullivan, 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc)). A “reviewing court should not be forced to speculate as to the grounds for an adjudicator’s rejection of a claimant’s allegations of disabling pain.” Bunnell, 947 F.2d at 346. As such, an “implicit” finding that a plaintiff’s testimony is not credible is insufficient. Albalos v. Sullivan, 907 F.2d 871, 874 (9th Cir. 1990) (per curiam).

Here, in discounting plaintiff’s testimony, the ALJ found the following: (1) plaintiff had received little treatment or therapy for her back and neck conditions; (2) plaintiff’s daily activities are not consistent with the alleged severity of her symptoms and limitations; and (3) plaintiff’s statements regarding her mental health symptoms are not supported by the objective findings of her treating mental health providers. [AR at 26-28.]

1. Limited Treatment

The ALJ found that plaintiff’s “allegations concerning the intensity, persistence and limiting effects of her symptoms” were “not entirely consistent” with the medical evidence. [Id.] He noted that although she testified that she had “severe, intractable pain” in her back and neck, the fact that she did not “frequently use narcotic pain medications and has had *little therapy or treatment* . . . for her back . . . lessens the consistency of her statements.” [AR at 27 (emphasis added).]

An ALJ may properly rely on the fact that only routine and conservative treatment has been prescribed to discount subjective symptom testimony. Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995). “Conservative treatment” has been characterized by the Ninth Circuit as, for example, “treat[ment] with an *over-the-counter pain medication*” (see, e.g., Parra v. Astrue, 481 F.3d 742, 751 (9th Cir. 2007) (emphasis added); Tommasetti v. Astrue, 533 F.3d 1035, 1040 (9th Cir. 2008) (holding that the ALJ properly considered the plaintiff’s use of “conservative treatment including physical therapy and the use of anti-inflammatory medication, a transcutaneous electrical nerve stimulation unit, and a lumbosacral corset”)), or a physician’s failure “to prescribe . . . any serious medical treatment for [a claimant’s] supposedly excruciating pain.” Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999).

1 Plaintiff contends that the record reflects that she saw two orthopedic physicians -- Dr.
2 Bashner and Dr. Simic – whom the ALJ neither named nor referred to in his decision. [JS at 5
3 (citing AR at 1190, 1244-50).] She observes that there are also MRI reports that corroborate her
4 “reports of pain,” and that the MRI report dated December 30, 2013, “revealed 3-4 mm disc bulges
5 at both her cervical and lumbar spinal regions.” [Id. (citing AR at 1150).] She states that the 2014
6 examination report by the orthopedic consultative examiner reflects that she had decreased range
7 of motion in her cervical and lumbar spines, and that she weighed 200 pounds. [Id. (citing AR at
8 1151, 1152).] Plaintiff deems this reason given by the ALJ for discounting her testimony to be
9 “meritless” because plaintiff “underwent a hysterectomy and hernia surgery,” and she “was
10 prescribed and took Diovan, Metropolol, and Clonidine,” which are used to treat hypertension, and
11 ADHD. [JS at 12 (citations omitted).] She notes that she treats with a chiropractor to “treat her
12 physical pain.” [Id.]

13 Defendant responds that the two orthopedic reports referred to by plaintiff were prepared
14 by “two different qualified medical examining physicians in Plaintiff’s workers compensation case.”
15 [JS at 8 (citing AR at 1190-93, 1244-50).] Defendant further asserts that plaintiff “fails to cite to
16 any evidence that she received anything other than the most basic treatment for her physical
17 impairments.” [Id.]

18 The Court agrees that the ALJ completely failed to mention and/or adequately consider
19 plaintiff’s treatment with Dr. Bashner, Dr. Simic, and chiropractor Michael D. Bateman, D.C.,
20 CCFC, QME, IDE. In fact, as discussed in more detail below, Dr. Bateman’s 15-year history of
21 treating plaintiff belies the ALJ’s assertion that plaintiff “has had little therapy or treatment . . . for
22 her back.” [AR at 27.] Moreover, in light of the fact that Dr. Bateman’s opinion provides support
23 for plaintiff’s testimony, as do the clinical findings of the consultative orthopedic examiner, this
24 error was not harmless. This was not a clear and convincing reason to discount plaintiff’s
25 subjective symptom testimony.

26 27 **2. Activities of Daily Living**

28 The ALJ also pointed to plaintiff’s description of her daily activities as not being consistent

1 with her complaints of disabling symptoms and limitations. [AR at 27, 28.] Plaintiff does not
2 address this reason, and defendant contends that although plaintiff mentioned the ALJ's reliance
3 on plaintiff's daily activities to find her testimony "less than fully credible," she "does not actually
4 challenge the ALJ's reliance on this factor" and, therefore, "any such error would be harmless as
5 Plaintiff has not presented any argument that the ALJ's reliance on daily activities was improper."
6 [JS at 6 (citations omitted).] Defendant also argues that the ALJ properly found that "with respect
7 to *both* the physical and mental impairments, Plaintiff's admitted levels of daily activity were
8 inconsistent with her allegations that her symptoms were disabling." [JS at 9 (citing AR at 27-28)
9 (emphasis added).]

10 The Court agrees that plaintiff presents no arguments with respect to this factor as it relates
11 to her physical impairments. Even if she did provide argument, the Court agrees with the ALJ's
12 assessment that plaintiff's ability to "extensively babysit her nieces," seems to be inconsistent with
13 her allegations of disabling physical pain. Indeed, plaintiff testified that although she can babysit
14 her nieces, the only reason she could not babysit for other children is that she is "so insecure," and
15 is "not well enough for them to want to hire me to take care of their children." [AR at 62.] She
16 explained that her nieces, who are 6 and "almost 2," and weigh 50 pounds and 25 pounds
17 respectively, do not ever let her sit, and that sometimes she has to lift them both at the same time.
18 [AR at 46-49.] She also said that "one of [her] nieces sometimes" is too heavy too lift. [AR at 47.]

19 However, the *only* mention by the ALJ of plaintiff's activities of daily living in connection with
20 plaintiff's mental impairments was a passing mention that "caring for small children can be quite
21 demanding, both mentally and physically." [AR at 28.] To the extent that this "dicta" was intended
22 to be a reason given by the ALJ for discounting plaintiff's testimony regarding her mental health
23 symptoms and limitations, the Court does not find it to be a clear and convincing reason supported
24 by substantial evidence.

25 As the matter is otherwise subject to remand based on the ALJ's failure to provide clear and
26 convincing reasons for discounting plaintiff's testimony regarding her mental health symptoms and
27 limitations (as the above reason was the *only* reason given for discounting that testimony), and
28 for reconsideration of the medical opinions of record relating to plaintiff's physical impairments,

1 the ALJ on remand must reconsider all of her testimony regarding her physical *and* mental
2 limitations.

3 4 **3. Objective Evidence**

5 While a lack of objective medical evidence supporting a plaintiff's subjective complaints
6 cannot provide the only basis to reject a claimant's subjective symptom testimony (Trevizo, 871
7 F.3d at 679 (quoting Robbins, 466 F.3d at 883)), it is one factor that an ALJ can consider in
8 evaluating symptom testimony. See Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005)
9 ("Although lack of medical evidence cannot form the sole basis for discounting pain testimony, it
10 is a factor the ALJ can consider in his credibility analysis."); accord Rollins v. Massanari, 261 F.3d
11 853, 857 (9th Cir. 2001). As the Ninth Circuit recently held, "an ALJ's 'vague allegation' that a
12 claimant's testimony is 'not consistent with the objective medical evidence,' without any 'specific
13 finding in support' of that conclusion, is insufficient." Treichler, 775 F.3d at 1103 (citation omitted);
14 see Laborin v. Berryhill, 867 F.3d 1151, 1153 (9th Cir. 2017) (ALJ's statement that plaintiff's
15 testimony regarding the intensity, persistence, and limiting effects of his symptoms was not
16 credible to the extent his testimony is "inconsistent with the above residual functional capacity
17 assessment" is an insufficient basis for discrediting testimony).

18 Here, the ALJ stated that plaintiff's mental health records "largely contain [plaintiff's] reports
19 of her symptoms, but there is little in the way of objective findings by her treating mental health
20 providers." [JS at 27 (citation omitted).] He noted that mental status examinations reflected that
21 plaintiff's "thinking was logical and there were no signs of cognitive difficulty," her ability to pay
22 attention was intact, she generally reported to her psychiatrist that she was "doing okay," she
23 discussed her complaints "about issues with her family to the psychologist . . . suggest[ing] that
24 [plaintiff] was experiencing situation stressors, but evidence does not support a frank psychiatric
25 basis for [her] reported subjective symptoms." [Id. (citation omitted).]

26 Plaintiff notes that the ALJ's finding that there was little in the way of objective findings from
27 her mental health treating providers "is untrue." [JS at 4.] She states that Daljit S. Mac, M.D.,
28 "documented findings on examination relative to mood, signs of anxiety, signs of depression, as

1 well as limited insight and judgment”; David R. Kauss, Ph.D., a licensed psychologist, noted that
2 plaintiff appeared depressed and anxious; termed her a “rambling historian”; found evidence of
3 impaired concentration and memory, and stated that she had trouble with remote recall and
4 difficulty with serial sevens; and, in a supplemental report after a “significant period of time of
5 psychiatric treatment,” Dr. Kauss opined that plaintiff “had a persistence of psychiatric symptoms,
6 with no significant improvement.” [JS at 4-5 (citing AR at 986, 987, 1033, 1256, 1261-1341).]
7 Plaintiff further submits that the record reflects the following: an anxious mood “nearly every time
8 on examination” [JS at 11 (citing AR at 895, 898, 904, 907, 913, 916, 919, 922, 925, 928, 931,
9 936, 938, 941, 944, 947, 950, 953, 1037 (as reported by the consultative examiner))]; a disheveled
10 appearance [*id.* (citing AR at 894, 915, 918, 930, 937, 946)]; agitated motor activity [*id.* (citing AR
11 at 894, 903, 909, 924, 930, 949)]; that she described feeling agitated and becoming upset easily
12 and reported crying spells [JS at 11-12 (citing AR at 904, 938, 941, 944, 947, 1141)]; that even
13 on Lexapro she was not doing well [JS at 11 (citing AR at 919)]; and that she required a lot of
14 support. [*Id.* (citing AR at 919).]

15 Defendant repeats the ALJ’s finding that the record included “few objective, positive mental
16 status examination findings from Plaintiff’s treating psychiatrist. On numerous occasions,
17 Plaintiff’s thinking was logical, and there were no signs of cognitive difficulties.” [JS at 9-10 (citing
18 AR at 27, 1120, 1216, 1218, 1226, 1232, 1234, 1238, 1240).]

19 The Court concludes that the ALJ’s finding that the objective evidence record did not
20 support plaintiff’s mental health limitations was not a clear and convincing reason supported by
21 substantial evidence to discount her testimony about her mental health limitations. In any event,
22 it was the *only* reason given for discounting her subjective symptom testimony on this issue, which
23 itself is error. Remand is warranted on this issue.

24 25 **B. ASSESSMENT OF OBJECTIVE MEDICAL EVIDENCE**

26 On December 30, 2013, Dr. Bateman issued a report regarding his treatment -- since 1997
27 -- of plaintiff. [AR at 1141-47.] In that report, he described the results of his February 26, 2013,
28 physical examination of plaintiff, and compared his grip strength findings to a similar examination

1 he had conducted in September 2005. [See AR at 1142.] In his February 26, 2013, examination,
2 Dr. Bateman generally found pain and tenderness to palpation in plaintiff's cervical and thoracic
3 spines; limited range of motion in the cervical spine; slight to moderate pain in the right elbow and
4 right wrist; "limited [range of motion of the elbow and wrist joints] at or near the end ranges of
5 flexion, extension abduction, abduction, supination and pronation"; and, based on cervical testing,
6 plaintiff was positive bilaterally for cervical compression, cervical distraction, and shoulder
7 depression. [Id.] With respect to plaintiff's thoracolumbar-sacral examination, he found palpable
8 pain and tenderness in the spinous processes at several levels; spasms; reduced range of motion;
9 positive Laseque's, Kemp's, Milgram's, and Valsalva tests; and positive bilateral leg raising test
10 results at 80 degrees and pain with passive leg raising. [AR at 1143-44.] Dr. Bateman reviewed
11 an August 30, 2013, MRI scan of plaintiff's cervical spine and noted moderate spondylosis from
12 C4-C7, moderate central canal stenosis at C4-C5 and C5-C6, and severe right foraminal
13 narrowing at C5-C6 and moderate bilateral foraminal narrowing at C6-C7. [AR at 1144.] He
14 further noted that an August 30, 2013, MRI of plaintiff's lumbar spine revealed marked
15 degenerative changes of the facets at L4-L5 associated with anterior degeneration
16 spondylolisthesis and moderate lateral recess stenosis, with mild bilateral foraminal narrowing;
17 and bilateral bulging without stenosis at L2-L3 and L3-L4. [Id.] Additionally, he stated that
18 September 5, 1997, x-rays revealed "[r]eversal of the cervical lordosis with moderate loss of the
19 disc space at C5-6. Moderate consummate arthropathy at C4-5 and C5-6." [AR at 1145.] He
20 diagnosed plaintiff with disc herniation at L4-L5 with spondylosis and moderate lateral recess
21 stenosis; lumbar spine degeneration; multiple disc herniations in the cervical spine with associated
22 degeneration and stenosis; sciatica; cervical radiculopathy; chronic wrist and hand pain; knee
23 pain; and leg pain. [Id.] Dr. Bateman opined that plaintiff's prognosis for improvement is "poor"
24 because the cervical and lumbar disc herniation "superimposed on [her] underlying degenerative
25 changes," as evidenced from the 1997 x-ray that "already had degenerative changes." [AR at
26 1146.] He stated that the 2013 MRI reflected that her condition "has markedly worsened." [Id.]
27 He stated that plaintiff is unable to sit for prolonged periods greater than 60 minutes; unable to
28 stand greater than 60 minutes without discomfort and increased radiculopathy in her lower

1 extremity; and the degenerative changes in her cervical spine causing radiculopathy in the upper
2 extremity with muscle weakness and pain has been “clinically correlated with positive orthopedic
3 testing, neurological and strength testing.” [AR at 1146-47.] He also stated the following:

4 [Plaintiff] has emotional and psychological issues that need to be addressed. They
5 are beyond the scope of my expertise. [She] has indicated that she has been
6 diagnosed with posttraumatic stress disorder. I have seen the emotional toll and the
7 effect of these stresses on Ms. Reyna over the 15 plus years that I have treated her
8 in my office. I have seen the emotional changes that have occurred. These would
9 in my opinion also cause in the patient to have limited employability. Thus, it is my
10 opinion, with a reasonable degree of medical and chiropractic certainty, Noelle
11 Reyna is not a candidate for any form of gainful employment.

12 [AR at 1146-47.]

13 Without discussing what Dr. Bateman’s conclusions were, the ALJ gave “little weight” to
14 them. [AR at 28.] The ALJ noted that a chiropractor is not considered an acceptable medical
15 source, and stated that “the extreme limitations [found by Dr. Bateman] are inconsistent with the
16 [April 29, 2014] findings and conclusions of the orthopedic consultative examiner, an acceptable
17 medical source. Additionally, there are no treatment notes from the chiropractor in the file
18 supporting his conclusions.” [AR at 28.]

19 Plaintiff states that Dr. Bateman treated her physical pain. [JS at 12 (citing AR at 1106).]
20 She notes that he issued his opinion in his capacity as a Qualified Medical Evaluator, and provided
21 a detailed analysis regarding her limitations. [JS at 15 (citing AR at 1141-47).] She argues that
22 the ALJ erred when he gave “little weight” to Dr. Bateman’s opinion and that he failed to articulate
23 the legal standard for evaluating “other source” opinions like those of Dr. Bateman. [Id.]

24 Defendant responds that the ALJ provided appropriate reasons for discounting the “other
25 source” opinion of Dr. Bateman. [JS at 19.]

26 The fact “that a medical opinion is from an ‘acceptable medical source’ is a factor that may
27 justify giving that opinion greater weight than an opinion from a medical source who is not an
28 ‘acceptable medical source’ because . . . ‘acceptable medical sources’ ‘are the most qualified
health care professionals.’” SSR 06-03p, 2006 WL 2329939, at *5. “Medical sources who are not
‘acceptable medical sources,’ [include] nurse practitioners, physician assistants, licensed clinical
social workers, naturopaths, chiropractors, audiologists, and therapists”, and “only ‘acceptable

1 medical sources' can [provide] medical opinions [and] only 'acceptable medical sources' can be
2 considered treating sources, whose medical opinions may be entitled to controlling weight." See
3 SSR 06-03p, 2006 WL 2329939, at *2 (citations omitted); see also Popa v. Berryhill, 872 F.3d 901,
4 907 (9th Cir. 2017). Nevertheless, even under the Administration's earlier regulations, evidence
5 from "other medical" sources, including chiropractors, can demonstrate the "severity of the
6 individual's impairment(s) and how it affects the individual's ability to function." SSR 06-03p, 2006
7 WL 2329939, at *2. Indeed, the Social Security Administration has recognized that with "the
8 growth of managed health care in recent years and the emphasis on containing medical costs,
9 medical sources who are not 'acceptable medical sources,' . . . have increasingly assumed a
10 greater percentage of the treatment and evaluation functions previously handled primarily by
11 physicians and psychologists." SSR 06-03p, 2006 WL 2329939, at *3. Therefore, according to
12 the Administration, opinions from other medical sources, "who are not technically deemed
13 'acceptable medical sources' under our rules, are important and should be evaluated on key
14 issues such as impairment severity and functional effects." Id.

15 Relevant factors when determining the weight to be given to an "other" medical source
16 include: how long the source has known and how frequently the source has seen the individual;
17 how consistent the opinion is with other evidence; the degree to which the source presents
18 relevant evidence to support an opinion; how well the source explains the opinion; whether the
19 source has a specialty or area of expertise related to the individual's impairments; and any other
20 factors that tend to support or refute the opinion. SSR 06-03p, 2006 WL 2329939, at *4-5. Thus,
21 "depending on the particular facts in a case, and after applying the factors for weighing opinion
22 evidence, an opinion from a medical source who is not an 'acceptable medical source' *may*
23 *outweigh* the opinion of an 'acceptable medical source" SSR 06-03p, 2006 WL 2329939,
24 at *5 (emphasis added). "For example, it may be appropriate to give more weight to the opinion
25 of a medical source who is not an acceptable medical source if he or she has seen the individual
26 more often than the treating source and has provided better supporting evidence and a better
27 explanation for his or her opinion." Id.

28 Based on the above, to the extent the ALJ discounted Dr. Bateman's opinion because he

1 is not an acceptable medical source, this was not a sufficient reason to discount his opinion.
2 Moreover, the ALJ did not discuss the nature and extent of plaintiff's treating relationship with Dr.
3 Bateman; the fact that his opinion was based on relevant evidence, including examination and
4 testing in both 2005 and in 2013, on MRIs and x-ray reports, and on Dr. Bateman's frequent
5 treatment and observation of plaintiff; how well Dr. Bateman articulated his opinion; or Dr.
6 Bateman's expertise as a chiropractor treating plaintiff's spine and neck impairments (and even
7 his observations of her mental health) for over 15 years. Indeed, other than the 2014 report of the
8 orthopedic consultative examiner, and a brief mention that there are "findings of some back and
9 neck pathology in the record" [AR at 27 (citing AR at 1128-32 (the August 30, 2013, reports of
10 plaintiff's cervical and lumbar MRIs))], the ALJ did not discuss *any* other medical evidence of
11 record relating to plaintiff's complaints of back and neck pain. Additionally, although the ALJ found
12 that Dr. Bateman's report was not corroborated by any treatment notes, the breadth and depth of
13 his discussion of plaintiff's longitudinal history and of his examinations in 2005 and in February
14 2013, demonstrate that his opinion was not made up out of whole cloth, and was *at least* along
15 the lines of a consultative examination. The ALJ, however, completely failed to comment *at all* on
16 any of Dr. Bateman's findings or limitations.

17 While an ALJ is not required to address all evidence presented to him, he must explain why
18 significant and probative evidence has been rejected. Vincent v. Heckler, 739 F.2d 1393, 1395
19 (9th Cir. 1984) (citation omitted). "[A]n explanation from the ALJ of the reason why probative
20 evidence has been rejected is required so that . . . [the] [C]ourt can determine whether the reasons
21 for rejection were improper." Cotter v. Harris, 642 F.2d 700, 706-07 (3d Cir. 1981) (citation
22 omitted). Moreover, an ALJ must consider all of the relevant evidence in the record and may not
23 point to only those portions of the record that bolster his findings. See, e.g., Holohan v.
24 Massanari, 246 F.3d 1195, 1207-08 (9th Cir. 2001) (holding that an ALJ cannot selectively rely
25 on some entries in plaintiff's records while ignoring others); Aukland v. Massanari, 257 F.3d 1033,
26 1035 (9th Cir. 2001) ("[T]he [ALJ]'s decision 'cannot be affirmed simply by isolating a specific
27 quantum of supporting evidence.'" (citing Sousa v. Callahan, 143 F.3d 1240, 1243 (9th Cir.
28 1998)); see also Reddick v. Chater, 157 F.3d 715, 722-23 (9th Cir. 1998) (it is impermissible for

1 the ALJ to develop an evidentiary basis by “not fully accounting for the context of materials or all
2 parts of the testimony and reports”); Robinson v. Barnhart, 366 F.3d 1078, 1083 (10th Cir. 2004)
3 (“The ALJ is not entitled to pick and choose from a medical opinion, using only those parts that
4 are favorable to a finding of nondisability.”); Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir.
5 1975) (an ALJ is not permitted to reach a conclusion “simply by isolating a specific quantum of
6 supporting evidence.”); Whitney v. Schweiker, 695 F.2d 784, 788 (7th Cir. 1982) (“[A]n ALJ must
7 weigh all the evidence and may not ignore evidence that suggests an opposite conclusion.”)
8 (citation omitted); Switzer v. Heckler, 742 F.2d 382, 385-86 (7th Cir. 1984) (“The ALJ is not entitled
9 to pick and choose from a medical opinion, using only those parts that are favorable to a finding
10 of nondisability.”).

11 In this case, the consultative orthopedic evaluator (to whom the ALJ gave “significant
12 weight,” albeit also without stating that examiner’s clinical findings or opinions), reviewed the same
13 2013 MRIs reviewed by Dr. Bateman, found similar reduced range of motion in plaintiff’s neck and
14 back, and also noted a positive straight leg raising test “limited to 80 degrees with considerable
15 hamstring spasms, bilaterally.” [AR at 1150-54.] There is no evidence that he reviewed any other
16 medical records, including Dr. Bateman’s report. Based on his one-time examination of plaintiff,
17 the consultative examiner determined that plaintiff suffered from “[c]ervical spine pain, with
18 radiation of pain into the upper extremities due to herniated discs and discogenic disease,” and
19 “[l]ow back pain, with radiation of pain into the lower extremities due to herniated discs and
20 discogenic disease.” [AR at 1154.] Notwithstanding these significant clinical findings (or
21 apparently, without considering plaintiff’s assessed weight of “220 lbs. without shoes”), the
22 consultative examiner, without explanation, found that plaintiff can “lift and carry 20 pounds
23 occasionally and 10 pounds frequently”; “stand and walk 6 hours in an 8-hour workday with
24 appropriate breaks, and sit 6 hours in an 8-hour workday with appropriate breaks”; pushing and
25 pulling is unlimited, “other than to lift and/or carry”; and posturally, she “is able to bend stoop,
26 crouch and climb occasionally.” [*Id.*]

27 Dr. Bateman’s examination, in contrast, was based on over 15 years of treatment of plaintiff
28 and on a complete physical examination in February 2013. His opinions in that report were based

1 on the same. Thus, Dr. Bateman's opinion could have been substantiated by his 15 years of
2 treatment notes had they been provided, but which were not part of the record. In fact, Dr.
3 Bateman's treatment of plaintiff's physical back and neck pain for over 15 years itself belies the
4 ALJ's finding that plaintiff "has had little therapy or treatment . . . for her back." AR at 27. The
5 Court finds (without deciding) that this may be one of those instances when more weight should
6 have been given to the opinion of the "other" medical source, because Dr. Bateman is a qualified
7 and licensed practitioner who has seen plaintiff far more often than the one-time consultative
8 examiner and provided better supporting evidence and a better explanation for his opinion than
9 did the consultative examiner.

10 In any event, the ALJ's failure to give legally sufficient reasons for rejecting Dr. Bateman's
11 opinion impacted on his assessment of whether plaintiff's medically determinable impairments
12 could reasonably be expected to produce the physical symptoms testified to by plaintiff. Moreover,
13 to the extent the ALJ also did not mention other treating providers, he must consider on remand
14 all of the medical evidence.

16 **C. MEDICAL OPINIONS AND OBESITY**

17 Plaintiff contends that the ALJ substituted his non-medical judgment for that of plaintiff's
18 health care professionals when he "downgrad[ed] [her] mental health impairments" and "boil[ed]
19 them into a sole impairment (anxiety)." [JS at 12]. She argues that her depression and PTSD
20 are severe impairments and it was error not to include them, or any limitations stemming from
21 them. [Id.] She points to the longitudinal records from Dr. Mac (her treating psychiatrist) and Ajay
22 Malhotra, Ph.D. (her treating psychotherapist), who have diagnosed her with major depressive
23 disorder, recurrent, moderate; ADHD; generalized anxiety disorder, PTSD, and panic disorder.
24 [JS at 13 (citing AR at 23, 1216).] Plaintiff also contends that the ALJ erred by not finding that
25 plaintiff's obesity was a severe impairment. [JS at 21.]

26 Defendant counters plaintiff's arguments.

27 Because the matter is being remanded for reconsideration of plaintiff's subjective symptom
28 testimony pursuant to SSR 16-3p with respect to her physical and mental impairments and

1 limitations, and for reconsideration of the medical opinion evidence generally, the ALJ on remand
2 must also reconsider the evidence of record regarding plaintiff's mental health impairments and
3 treatment, and consider the impact, if any, of her obesity on her RFC.

4 5 VI.

6 **REMAND FOR FURTHER PROCEEDINGS**

7 The Court has discretion to remand or reverse and award benefits. Trevizo, 871 F.3d at
8 682 (citation omitted). Where no useful purpose would be served by further proceedings, or where
9 the record has been fully developed, it is appropriate to exercise this discretion to direct an
10 immediate award of benefits. Id. (citing Garrison, 759 F.3d at 1019). Where there are outstanding
11 issues that must be resolved before a determination can be made, and it is not clear from the
12 record that the ALJ would be required to find plaintiff disabled if all the evidence were properly
13 evaluated, remand is appropriate. See Garrison, 759 F.3d at 1021.

14 In this case, there are outstanding issues that must be resolved before a final determination
15 can be made. In an effort to expedite these proceedings and to avoid any confusion or
16 misunderstanding as to what the Court intends, the Court will set forth the scope of the remand
17 proceedings. First, because the ALJ failed to provide specific, clear and convincing reasons,
18 supported by substantial evidence in the case record, for discounting plaintiff's subjective symptom
19 testimony regarding her physical and mental health impairments and limitations, the ALJ on
20 remand, in accordance with SSR 16-3p, shall reassess plaintiff's subjective allegations and either
21 credit her testimony as true, or provide specific, clear and convincing reasons, supported by
22 substantial evidence in the case record, for discounting or rejecting any testimony. Second, the
23 ALJ on remand shall reassess the medical record relating to plaintiff's physical and mental health
24 impairments, including the opinion of Dr. Bateman, and other treating providers (some of whom
25 have been mentioned herein). The ALJ must explain the weight afforded to each opinion and
26 provide legally adequate reasons for any portion of an opinion that the ALJ discounts or rejects,
27 including a legally sufficient explanation for crediting one doctor's opinion over any of the others.
28 Finally, based on his reevaluation of the medical record and plaintiff's subjective symptom

1 testimony, and his consideration of plaintiff's alleged obesity and its effects, if any, on her
2 limitations, the ALJ shall reassess plaintiff's RFC and determine, at step five, with the assistance
3 of a VE if necessary, whether there are jobs existing in significant numbers in the national
4 economy that plaintiff can still perform.⁶ See Shaibi v. Berryhill, 870 F.3d 874, 882-83 (9th Cir.
5 2017).

6
7 **VII.**

8 **CONCLUSION**

9 **IT IS HEREBY ORDERED** that: (1) plaintiff's request for remand is **granted**; (2) the
10 decision of the Commissioner is **reversed**; and (3) this action is **remanded** to defendant for further
11 proceedings consistent with this Memorandum Opinion.

12 **IT IS FURTHER ORDERED** that the Clerk of the Court serve copies of this Order and the
13 Judgment herein on all parties or their counsel.

14 **This Memorandum Opinion and Order is not intended for publication, nor is it**
15 **intended to be included in or submitted to any online service such as Westlaw or Lexis.**

16 

17 DATED: November 5, 2018

18 _____
19 PAUL L. ABRAMS
20 UNITED STATES MAGISTRATE JUDGE
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27 ⁶ Nothing herein is intended to disrupt the ALJ's step four finding that plaintiff is unable to
28 perform her past relevant work as a stock clerk, a florist, a retail assistant manager, a bead
worker, and a picture framer. [AR at 28.]